SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

PEOPLE'S ADVOCATE, et al.

Plaintiffs,

vs.

INDEPENDENT CITIZEN'S OVERSIGHT COMMITTEE, et al.

Defendants.

No. HG05 206766
(Consolidated Action)

CALIFORNIA FAMILY BIOETHICS COUNCIL, LLC,

Plaintiff

vs.

CALIFORNIA INSTITUTE FOR REGENERATIVE MEDICINE, et al.,

Defendants

No. HG05 235177

PROPOSED STATEMENT OF DECISION

This is a consolidated validation proceeding to determine the constitutional validity of Proposition 71, the California Stem Cell Research and Cures Act, together with bonds issued pursuant thereto. The action came on for trial on February 27, 2006. Plaintiff People's Advocate and National Tax Limitation Foundation (jointly "Plaintiff People's Advocate") appeared by Robert M. Taylor, Dana Cody, and Terry Thompson. Plaintiff California Family Bioethics Council ("Plaintiff CFBC") appeared by David Llewellyn. Defendants appeared by Tamar Pachter and Katherine Sears of the Office of the Attorney General. James Harrison also appeared on behalf of Defendant California Institute for Regenerative Medicine ("CIRM").

I. PROCEDURAL BACKGROUND

Plaintiff People's Advocate's action was initially filed in this Court on April 6, 2005 as a taxpayer action for declaratory and injunctive relief, seeking to invalidate the California Stem Cell Research and Cures Bond Act ("the Act"), Health & Saf. Code, §125290.10 et seq.[1] The grounds asserted are that the Act violates Article XVI, section 3 of the California Constitution[2] by mandating the drawing of moneys from the State Treasury for the purpose or benefit of an institution not under the exclusive management and control of the State ("People's Advocate Action"). That suit named as Defendants the Independent Citizens' Oversight Committee ("ICOC"); Robert Klein, as chair of the ICOC; Arnold Schwarzenegger, as Governor of California; Cruz Bustamante, as Lieutenant Governor; Phil Angelides, as State Treasurer; and Steven Westly, as State Controller. Plaintiff People's Advocate later filed an amendment to the Complaint,

[1] All references to statutes are to the Health and Safety Code unless otherwise indicated.

[2] All references to the Constitution are to the California Constitution

adding defendant Zach Hall, as interim president of the ICOC, and dismissing Governor Schwarzenegger and Lt. Governor Bustamante from the action.

On May 9, 2005, the California Stem Cell Research and Cures Finance Committee ("Finance Committee"), created pursuant to the Act (§125291.40), met and authorized issuance of $3 billion in general obligation bonds. On July 6, 2005, Plaintiff CFBC filed a reverse validation action pursuant to Code of Civil Procedure section 860, et seq., in Sacramento County, challenging the validity of Proposition 71 and the bonds issued under its authority. The defendants named in that action are CIRM, the State of California, the Finance Committee, and "all persons interested in the matter of the legality of Proposition 71, and validity of actions, bonds and financing of CIRM" ("CFBC Action"). Plaintiff CFBC's challenge to the bonds is asserted on the grounds that the Act authorizing their issuance is unconstitutional for several reasons, including the violation of Article XVI asserted by Plaintiff People's Advocate, and on statutory and common law grounds.

Upon motion by Defendants in the People's Advocate Action, the CFBC Action was coordinated with the People's Advocate Action. Following completion of publication of summons in the CFBC Action, the matter was transferred to this Court, and the two actions were consolidated for all purposes.

On November 29, 2005, the Court denied the parties' cross motions for judgment on the pleadings.

At trial, the parties stipulated to various facts, and presented evidence as to others. Plaintiff People's Advocate presented documents and deposition testimony into the record as evidence supporting its case in chief, and presented no live testimony. Plaintiff

CFBC put on the testimony of Robert Klein, Chair of ICOC, and submitted documents and deposition testimony. Defendants put on testimony of Robert Klein, Juan Fernandez (Director of Public Finance for the State Treasurer), Walter Barnes (CIRM's Chief Administrative Officer), and Dr. Zach Hall (CIRM's President and Chief Scientific Officer), and submitted documents and deposition testimony. Presentation of live testimony concluded on March 2, 2006. The parties submitted closing arguments on March 9, 2006, and reply arguments on March 15, 2006. Further evidence was submitted by stipulation, on March 29, 2006, after which the Court took the matter under submission.

II. FACTUAL BACKGROUND

On November 2, 2004, Proposition 71, the California Stem Cell Research and Cures Act, was approved by a majority of the voters of the State of California in a general election, to publicly fund stem cell research in California. Proposition 71 adds Article XXXV to the Constitution, which, among other things, creates the CIRM and authorizes and funds pioneering stem cell and other scientific research in California, especially research that cannot, or is unlikely to, receive timely or sufficient federal funding, for the development of regenerative medical treatments and cures. (Proposition 71 ("Prop. 71"), §3.)

Proposition 71 also adds the California Stem Cell Research and Cures Bond Act to the Health and Safety Code. (§125290.10, et seq. ("the Act").

The Act creates the Defendant ICOC, to act as CIRM's governing body. (§125290.15.) The ICOC is authorized to oversee CIRM's operations; develop strategic research and financial plans for CIRM; develop and finalize research standards; make

final decisions on grant awards within California; ensure the completion of annual audits of CIRM's operations; issue public reports regarding CIRM's activities; establish policies regarding intellectual property rights arising from research funded by CIRM; establish rules and guidelines for the operation of the ICOC and its working groups; select the members of the working groups; and adopt rules and regulations to carry out all of the above. Further, the ICOC is authorized to request the issuance of bonds from the Finance Committee and loans from the State's Pooled Money Investment Board, and annually may modify its funding and finance programs in order to balance the goals for CIRM running revenue-positive for the first five years without jeopardizing progress on CIRM's core medical and scientific research program. (§125290.40.)

The ICOC has 29 members. Twenty-two members are appointed by elected officials (the Governor, Lieutenant Governor, Treasurer, Controller, Speaker of the Assembly, and President Pro Tem of the Senate) and are appointed on the basis of their background as it relates to matters within the ICOC's responsibility, including stem cell research, administration of scientific and medical research grants, high achievement in the sciences, management of multi-million dollar research grants, development of medical therapies, and disease advocacy. (§125290.20(a)(2)-(5).) Two members, the ICOC chair and vice chair, are elected by the other ICOC members from individuals nominated by the Governor, Lieutenant Governor, Treasurer, and Controller. (§125290.20(a)(6).) The five remaining members are executive officers of University of California campuses, appointed by their chancellors. (§125290.20(a)(1).)

The Act makes the ICOC and CIRM generally subject to the conflict of interest statutes. However, since the Act requires that most of the ICOC members be leaders of

entities with demonstrated interest and/or expertise in stem cell research, which creates the potential for conflicts of interest, the Act also provides certain exemptions from the conflict of interest laws. (§125290.30(g).)

The Act includes provisions requiring accountability to the public. The Act requires the ICOC to issue an annual public report and to commission an annual independent financial audit to be provided to and publicly reported on by the State Controller. (§125290.30(a)-(b).) It creates a Citizens' Financial Accountability Oversight Committee that is chaired by the Controller and is comprised of five other members, four of whom are appointed by elected officials, and one of whom is appointed by the chair of the ICOC. (§125290.30(c).) The Act requires the ICOC to hold public meetings pursuant to the Bagley-Keene Open Meeting Act, with exemptions for certain defined situations. (§125290.30(d).) The Public Record Act is generally applicable to CIRM records. (§125290.30(e).) All CIRM contracts, other than those for grants or loans approved by the ICOC, are subject to competitive bidding, and must comply with the competitive bidding requirements applicable to the University of California. (§125290.30(f).)

The Act also sets limits and standards on the ICOC's exercise of the discretion granted to it. For example, the Act requires that certain specific criteria be met with respect to allocating funds (§125290.70(a)), and mandates that the ICOC establish intellectual property agreements that take into consideration the opportunity of the State to benefit from the intellectual property developed from the research by grantees (§125290.30(h)). The Act sets forth criteria to be met by the ICOC in adopting scientific and medical standards (§125290.35(b)), criteria to be used by the ICOC in choosing

members for its working groups, and criteria to be used by the working groups in evaluating grant and loan applications (§125290.55-.65).

The Act also creates the California Stem Cell Research and Cures Finance Committee ("Finance Committee"). (§125291.40(a).) The bonds that fund the research and work of CIRM are issued as provided in the State General Obligation Bond Law. (§125291.35.) The six-member Finance Committee, which has sole authority to issue and sell the bonds, includes the State Treasurer, who chairs the committee, the Controller, and the Director of Finance, as well as three ICOC members. (§125291.40(a).) Meetings of the Finance Committee are subject to the Bagley-Keene Open Meeting Act. (See Gov. Code §11121.) The Finance Committee must determine whether or not "it is necessary or desirable to issue bonds . . . in order to carry out the actions specified in this article and, if so, the amount of bonds to be issued and sold." (§125291.45(a).) The Finance Committee has the authority to issue either taxable or tax-free bonds. (*Id.*) The Act limits the discretion of the Finance Committee by providing that the total amount of bonds that may be issued in a calendar year shall not exceed $350 million. (§125291.45(b).) Proceeds of the bonds are deposited in the State Treasury, with the exception of funds used to repay interim debt. (§125291.25.) The Director of Finance has the authority to make funds available to CIRM from the State's General Fund, not to exceed the amount of unsold bonds authorized by the Finance Committee. (§125291.60.)

III. BURDEN OF PROOF

The standard for reviewing whether a statute enacted by initiative is unconstitutional is summarized in *Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal. 3d 805, 814-815:

> In adjudicating such constitutional issues, our duty is clear: "We do not consider or weigh the economic or social wisdom or general propriety of the initiative. Rather, our sole function is to evaluate [it] legally in the light of established constitutional standards." (*Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 219; see *Ferguson v. Skrupa* (1963) 372 U.S. 726, 730. "**[All] presumptions and intendments favor the validity of a statute and mere doubt does not afford sufficient reason for a judicial declaration of invalidity. Statutes must be upheld unless their unconstitutionality clearly, positively, and unmistakably appears.**" (*In re Ricky H.* (1970) 2 Cal.3d 513, 519; *In re Dennis M.* (1969) 70 Cal.2d 444, 453; *Lockheed Aircraft Corp. v. Superior Court* (1946) 28 Cal.2d 481, 484.) If the validity of the measure is "fairly debatable," it must be sustained. (*Associated Home Builders etc., Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 605; *Hamer v. Town of Ross* (1963) 59 Cal.2d 776, 783 and cases cited therein).
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> [Emphasis added.] See also *Legislature v. Eu* (1991) 54 Cal.3d 492, 501.

In attempting to void the Act in its entirety, Plaintiffs cannot prevail in a challenge by "suggesting that in some future hypothetical situation, constitutional problems may possibly arise to the particular *application* of the statute . . [but] must demonstrate that the act's provisions inevitably pose a present total and fatal conflict with the applicable constitutional prohibitions." *Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168, 180-181. This is a substantial burden, and one which Plaintiffs have not satisfied here.

Plaintiffs' claims are not helped by their argument that they are raising "as applied" challenges, because such claims would not invalidate the Act as a whole. A facial challenge to the constitutional validity of a statute or ordinance considers the measure itself, not its application. (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084; accord *California Teachers Ass'n v. State of California* (1999) 20 Cal.4th 327, 338.) In contrast, "[a]n as applied challenge may seek (1) relief from a specific application of a facially valid statute . . . to an individual or class of individuals . . . , or (2) an injunction against future application of the statute or ordinance in the allegedly

impermissible manner it is shown to have been applied in the past." (*Tobe, supra*, 9 Cal.4th at 1084.) The remedy for a pattern of as-applied violations is an order enjoining the future unlawful application, not the invalidation of the statute. (See *id.*, at pp. 1084-1086.) If the relief sought, as here, is an order enjoining any enforcement of the statute, that is a facial and not an as-applied attack. (*Id.*, at pp. 1086-1087.)

IV. VIOLATION OF ARTICLE XVI, SECTION 3

Both Plaintiffs argue that the Act is unconstitutional on the ground that the Act, and the authority that it gives to the CIRM and the ICOC, violate Article XVI, section 3 of the Constitution because these entities are not "under the exclusive management and control of the State." This claim fails for two reasons.

A. Public Purpose

Article XVI, section 3 of the Constitution provides in relevant part: "No money shall ever be appropriated or drawn from the State Treasury for the purpose or benefit of any corporation, association, asylum, hospital, or any other institution not under the exclusive management and control of the State as a State institution." This provision prevents the appropriation of funds from the state fisc for a purpose foreign to the interests of the State and outside its control. *California Ass'n of Retail Tobacconists v. State of California* (2003) 109 Cal.App.4th 792, 816 (hereafter referred to as "*CART*"). It does not, however, preclude the State from expending public funds for legitimate state purposes, or prohibit such expenditures merely because the state entity has some degree of autonomy or is run in an innovative manner. *Id.*

Article XVI, section 3 is not a blanket prohibition against any appropriation of funds to entities that are not exclusively under state control. It was not intended to

unduly restrict the State in the expenditure of public funds for legitimate state purposes. Rather, it restricts the expenditure only when public funds are for the benefit or purpose of the uncontrolled entity rather than for the benefit or purpose of the State. *People v. Honig* (1996) 48 Cal.App.4th 289, 352; *California Housing Finance Agency v. Elliott* (1976) 17 Cal.3d 575, 586. The prohibition of Article XVI, section 3 is not applicable to those situations in which private parties are benefited by state appropriations only as an incident to the promotion of a public purpose. *Id.*

At trial, Plaintiffs did not present any evidence that the State is appropriating funds for any purpose or benefit other than a public purpose—the public purpose declared in Proposition 71 of fighting disease and promoting the general economy of the state. There was no evidence that the funds appropriated under the Act are for the benefit or purpose of CIRM or the ICOC, or that CIRM or the ICOC serve any private purpose. The evidence showed that neither CIRM nor the ICOC could profit from the bond moneys authorized by Proposition 71, or use them for their own benefit. Testimony was presented that should the State Controller perceive that public funds were being diverted to a purpose not authorized by Proposition 71, he could and would refuse to issue warrants and, further, that in such a case the Finance Committee could and would decline to issue bonds.

B. Exclusive Management and Control of the State

i. Indicia of Control of the State

Finding that the funds in this instance are for a public purpose, the Court next considers whether there are sufficient controls over CIRM and the ICOC by the executive and legislative branches of the state government to assure that state funds are

used to further these state purposes without unduly inhibiting innovative programs that serve those purposes. *CART*, at 817. Whether an entity is under the exclusive management and control of the State is determined through a case-specific evaluation of the applicable executive and legislative controls. *Id.* at 816-817.

A review of the Act and the evidence offered at trial show that numerous such controls exist in the Act at issue here. Twenty-four out of 29 members of the ICOC are appointed or nominated by elected officials, with the remaining five appointed by appointed public officials. *Cf. CART* at 822.[3] As in *CART*, the members are appointed to fixed terms.[4] The fact that there is no power of removal by the appointing officials is common to state agencies, and so not relevant to the analysis. *CART* at 823, n.14. Moreover, there was evidence that ICOC members can be removed from office for violations of law. The Act places strictures on how the ICOC is to apportion the bond money, mandating percentage amounts to be spent on administration, construction of facilities, medical research, etc., as well as mandating broad goals for spending the funds. *Cf. CART* at 823-24. The Act requires annual public reports and independent audits, and puts in place an oversight committee comprised of the State Controller and members primarily appointed by elected officials. *Cf. CART* at 824. The Act requires that the members adopt a conflict of interest code, and conduct business subject to the Bagley-Keene open meetings law and the Public Records Act. *Cf. CART* at 826. The

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[3] This is in contrast to the case relied on by Plaintiffs, *Howard Jarvis Taxpayers Assn. v. Fresno Metropolitan Projects Authority* (1995) 40 Cal.App.4th 1359, 1383-88. There, 11 of 13 directors on the Authority were chosen by private entities who had no public accountability.

[4] Plaintiffs try to make much of the fact that the ICOC members' terms will not end until after the terms of the elected officials who have appointed them. In this respect, however, the appointments mirror those of any appointed public official—appointments are frequently made that will extend beyond the appointing public official's term in office. Plaintiffs have offered no evidence or legal basis for determining that such appointments should be treated any differently than those that do not extend beyond the official's term.

analysis by the Legislative Analyst in the official voter pamphlet advised the voters that the Act was creating a "new state institute", and in the ballot argument against Proposition 71 the opponents argued that it would create a "costly new state bureaucracy." (Exh. 2, at pp. 69 and 73 [emphasis added].) *Cf. CART* at 828.

The evidence at trial establishes that the application of the Act has been in compliance with its statutory framework, and that CIRM and the ICOC are operating in the same fashion as other state agencies. Each ICOC member, and each alternate, has taken the oath of office and publicly filed Form 700, the standard form California public officials file to disclose financial holdings. The ICOC developed and adopted incompatible activities statements, the conflict of interest code required by the Political Reform Act, and conflict of interest policies for ICOC members, CIRM staff, and members of each of the ICOC advisory groups. Between January 2005 and the date of trial, the ICOC, its subcommittees, and its working groups held over 40 noticed, public meetings, in cities across the state, held pursuant to the Bagley-Keene Open Meeting Act. CIRM has responded to numerous Public Records Act requests. The selection of the site for CIRM's facilities was run by the Department of General Services, as required of state agencies, which department also executed the lease. The required independent audit is in process and is to be reviewed by the Citizen's Financial Oversight Committee. In addition, testimony was presented that CIRM is subject to audit by the Controller and the Department of Finance, and that the Controller has met with the ICOC to discuss the type of practices he expected the ICOC to follow.

There was also evidence that the State Treasurer, Controller, and Director of Finance, through their membership on the Finance Committee, exercise their authority to

make sure that bonds are only issued for purposes permitted by the Act. Further, there was evidence that the State Legislature has already held several public oversight hearings looking into CIRM's budget, policies, and standards, which is pertinent not only because it shows on-going oversight by the Legislature, but because the Act expressly provides that the Legislature can amend the Act "to enhance the ability of the institute to further the purposes of the grant and loan programs." after a three-year start-up period. (Prop. 71, §8.)

ii. ICOC Membership

Plaintiff People's Advocate argues that many of the indicia of state management and control set forth above are not relevant to their claim, because they pertain to CIRM, rather than to the ICOC itself, which is the entity Plaintiff People's Advocate is challenging as being outside state control. The ICOC, however, is not a discrete entity, separate and apart from CIRM, but rather its governing body. Proposition 71 authorizes CIRM, not the ICOC, to make grants and loans for stem cell research. (Const. Art. XXXV, §2(a).) The ICOC does not disburse the funds; it decides to whom CIRM will disburse them. (§125290.40(c).) Thus state controls over CIRM are controls over the making of loans and grants and the disbursal of funds.

Moreover, Plaintiffs' argument that the ICOC members are not subject to state control because they are "representatives" of, and thus accountable to, their constituent institutions and interest groups, rather than true "public" officials accountable to the citizens of the State, is not supported by the text of the Act or the evidence presented at trial. The Act sets up the ICOC as a panel of experts, whose members are appointed on the basis of their qualifications as they relate to matters within the ICOC's responsibility.

These qualifications include experience in stem cell research, administration of scientific and medical research grants, management of multi-million dollar research grants, development of innovative medical therapies, and disease advocacy. (§125290.20(a).) ICOC members are not appointed based on their affiliation with any particular institution, but rather are appointed on the basis of a type of affiliation or an affiliation with a specified type of institution.

The Act provides that the ICOC be composed of executive officers from the five University of California campuses with medical schools, other California universities, California nonprofit academic and research institutions, and California commercial life sciences entities, and individuals associated with various disease advocacy groups. (§125290.20(a).) No evidence was presented as to how these statutory criteria limit the public accountability of the ICOC members. Moreover, except for the five ICOC members appointed by the UC chancellors, the decisions as to who will serve on the ICOC are not made by the various institutes who employ the members (a practice forbidden under *Howard Jarvis Taxpayers, supra*, 40 Cal.App.4th 1359, 1388), but by elected officials.

The testimony of the ICOC members shows that while participating on the ICOC they are acting for the people of the State of California and to further the interests of the State as expressed in Proposition 71—not acting on behalf of their employer or the patients of the particular disease which is their "constituency". They all take the oath of office of a public official, and all file Form 700s. None are permitted to vote on any grant application from their employer or any other institution with which they have a conflict of interest. While there was some evidence that the ICOC members were

permitted to consult with others at their associated institution or employer, there is no evidence that such consultation was in any way a requirement, or that the ICOC members were making decisions on behalf of their employers, rather than as individual committee members.

There is no evidentiary or legal basis presented for assuming that any individual ICOC member is beholden to an institution or entity to such a degree that he or she is incapable of acting other than in the interest of that institution or entity while serving on the ICOC. See *Consumers Union v. California Milk Producers Advisory Bd.* (1978) 82 Cal.App.3d 433, 448 ("Merely because a board member derives income from within a given industry, he or she does not lose the ability to be objective. Nor does the person lose the capacity to make decisions beneficial to the public's interest.")

iii. Appointment of Alternates

Plaintiffs also argue that the appointment of alternates by ICOC members to act on their behalf at ICOC meetings impermissibly removes the ICOC from the control of the State. The Court notes that such alternates are required to meet the same criteria as the members of the ICOC, i.e., be executive officers of the academic institution or life science commercial entity or a medical school dean, take the same oath of office, and file the same disclosure forms. (§125290.20(a)(2)(D).) They are appointed by the members who have been appointed by public officials, not by the institutions they represent, and can be terminated by those members at any time. Evidence was presented as to the value of allowing the ICOC members who are appointed on the basis of their status as executive officers to appoint alternates, who are also executive officers from the same institutions. Mr. Klein testified that it is and has been important to have the

expertise of the executive officer members on the committee, even though most at that level of their profession could not be expected to attend all of the many meetings held by the ICOC during the year. Thus the appointment of alternates allows the ICOC to have the benefit of the expertise of alternates who share the same qualifications as members, when members of the ICOC are unavailable.

The Court concludes that the appointment of alternates as provided in the Act is a permissible degree of flexibility and operational independence needed to further the public purposes of the Act, and thus does not cause the ICOC to be in violation of Article XVI, section 3. *CART,* at 817.

iv. Grants Working Group

Plaintiffs also assert that a lack of state control exists over CIRM and the ICOC because it is the Scientific and Medical Working Group ("Grants Working Group") established by the ICOC (i.e., a group with members not appointed by elected officials) that make the real decisions as to who gets the grant money from CIRM. They argue that because the ICOC can only approve grant applications approved by the Grants Working Group, the ICOC is not making the final decisions as to what awards are made. The evidence does not support this claim.

First, there is no provision in the Act that the ICOC cannot vote on any proposal it chooses to consider. While the Act mandates that the ICOC *must* consider the Grants Working Group recommendations, including minority reports, in making its funding decisions, the Act does not mandate that the ICOC *only* consider such recommendations. (§125290.50(d).)

Second, the evidence at trial, including deposition testimony of the ICOC members, supports a conclusion that they, not the Grants Working Group, make the ultimate award decisions. The evidence establishes the following: The ICOC sets forth in its Requests for Applications what types of grant applications the Grants Working Group will evaluate. The Grants Working Group then reviews grant and loan applications based on criteria, requirements, and standards adopted by the ICOC. (See also §125290.60(b)(4).) Information on all of the applications evaluated by the Grants Working Group, including those for which funding is not recommended, are forwarded to the ICOC. Although it would require going into closed session, the ICOC members could obtain further information than that contained in the summaries provided by the Grants Working Group with their recommendations, including full application materials. (See also §12590.30(d)(3).) ICOC members view the Grants Working Group as an advisory group, whose members the ICOC selected and provided with standards to apply in evaluating grant applications, but recognize that the ICOC itself is the final decision-maker. ICOC members are not required to approve all grant applications recommended by the Grants Working Group, or precluded from approving others when they believe it is appropriate. At the one meeting at which award decisions have been made, the grant applications that were recommended by the Grants Working Group were thoroughly discussed on an individual basis, along with one application that had not been recommended. In awarding the training grants, the ICOC made changes in various ways to several of the recommendations presented by the Grants Working Group.

The Court concludes that it is the ICOC that is the ultimate decision making body for CIRM awards, not the Grants Working Group.

v. State's Failure to Address Violations of the Act

Plaintiffs argue that the ICOC and CIRM have violated the Act in several ways, and that the failure of the Legislature and executive branch to address these violations is evidence of a lack of state control. This argument is not supported by the evidence.

The first "violation" asserted by Plaintiffs is the ICOC's appointment of alternate members for the Grants Working Group. Defendants assert that such appointments were not authorized under the Act, and were beyond the reach of any state control. However, Dr. Hall, CIRM's President and Chief Scientific Officer, testified to his, and CIRM's, belief that this action is within the ICOC's authority in that no more than 15 scientist members (the number mandated by the Act) ever serve on the Grants Working Group at any time; that alternates, who are appointed by the ICOC, serve at the direction of CIRM staff to replace members who are unable to attend a meeting, or who have a conflict, and not at the direction of working group members themselves; and that the alternates must meet the same qualifications for appointment as all scientist members of the Grants Working Group. The agency's interpretation of its authorizing statute is entitled to "great weight and respect." (*Yamaha Corp. v. State Bd. of Equalization, supra,* 19 Cal.4th at 12.)

Moreover, even assuming that the Act did bar the appointment of these alternates, there was no evidence presented by Plaintiffs that responsible state officials could not limit or stop their use.

The second "violation" asserted by Plaintiffs is that training grants were awarded by CIRM, although the Act limits the use of funds allocated for grants to research (90% of grant money) and facilities (10% of grant money). (§125290.70(a).) The evidence,

however, supports the fact that the training grants would indeed be used to perform research, since it is through research that training in the field of stem cell research is conducted.

The third "violation" asserted by Plaintiffs is ICOC's approval of the hiring of outside counsel. The Act provides that, unlike other state agencies, "the institute is authorized to retain outside counsel when the ICOC determines that the institute requires specialized services not provided by the Attorney General's office." (§125290.45(a)(3).) Plaintiffs argue that the ICOC's hiring of counsel was primarily for the purpose of litigation, and so was not outside the services provided by the Attorney General. However, the evidence shows that outside counsel was hired specifically for his expertise and experience in setting up a new state agency. Plaintiffs have not provided any evidence that such specialized services were regularly provided by the Attorney General's office, or that the Attorney General in any way objected.

The Court finds that Plaintiffs have not proven that the actions asserted were actually violations of the Act, or that, if they had been, they could not have been deterred or stopped by other state entities.

In light of the above, Plaintiffs have not met their burden of showing that the Act appropriates funds for other than a public purpose, or lacks applicable legislative and executive controls to such an extent that the Act is clearly, positively and unmistakably unconstitutional.

V. CONFLICTS OF INTEREST

Plaintiff CFBC avers as one basis for the invalidation of the Act, and the bonds issued thereunder, various violations of conflict of interest law. In its Post-Trial Brief,

Plaintiff CFBC sets forth several different bases for this claim, which can be summarized as follows: (i) that the award of training grants in September 2005 by the ICOC was in violation of conflict of interest statutes or regulations; (ii) that certain members of the ICOC are, by their participation on the committee, in violation of conflict of interest statutes, common law, and/or the Act because of various interests they hold; (iii) that the Act is incorrect in stating that the Working Group is not subject to conflict of interest statutes because it is an advisory group; and (iv) that the Act's exemption of the ICOC and the Working Group from conflict of interest statutes is unconstitutional. (See CFBC's Post Trial Brief, pp.20-37.)

A. Award of Training Grants

Even if there were evidence to support Plaintiff's claims that the awards of certain of the training grants were in violation of conflict of interest law, such a violation would not invalidate the Act or the bonds, and so is not pertinent to the instant lawsuit. The complaint filed by Plaintiff CFBC does not challenge the validity of specific awards made by the ICOC. Indeed, since it was filed before any such awards were made and not amended after that time, it could not. Therefore the Court does not further address this set of conflict of interest claims.

B. Membership of ICOC

Plaintiff CFBC's second set of claims contends that the members of the ICOC, including the chair and vice chair, have conflicts of interest that preclude their service on the ICOC. These claims, like the first set, do not go to the validity of the Act as a whole, but only address whether these particular members should have been appointed to the ICOC. Thus, even if supported by the evidence, the claim would not invalidate the Act

or the bonds. However, Plaintiff CFBC, in its Second Cause of Action in the Amended Complaint, also seeks declaratory relief in the form of a declaration that the members of the ICOC are disqualified from holding public office on the ICOC and that the chair and vice chair are disqualified to be employees of CIRM. For that reason, the Court will address this set of claims.

As to the members of the ICOC as a whole, the claim fails as it is not supported by the law or the evidence. Plaintiff CFBC argues that every member of the ICOC has a conflict of interest under Government Code section 8920(a) and the common law, arising from either his or her financial interests or personal interest in the cure of a particular disease. Section 8920(a) is part of the "Code of Ethics" in the chapter of the Government Code entitled "Legislative Organization." It states:

> No . . . appointive officer . . . shall, while serving as such, have any interest, financial or otherwise, direct or indirect, or engage in any business or transaction or professional activity, or incur any obligation of any nature, which is in substantial conflict with the proper discharge of his duties in the public interest and of his responsibilities as prescribed in the laws of the state.

ICOC members' potential conflicts of interest arising from financial interests, however, are controlled not by this statute, but by the conflict of interest provisions of the Act and the provisions of the Political Reform Act of 1974. Under rules of statutory construction, a later, more specific statute controls over an earlier, general statute. *Woods v. Young* (1991) 53 Cal.3d 315, 324-325. Government Code section 8920(a) was enacted in 1966. The Political Reform Act of 1974 (Government Code §81000, et seq.) is a later statute, with very specific provisions concerning conflicts of interest arising from financial interests. (See Govt. Code §87100, et seq.) Since a specific provision relating to a particular subject will govern a general provision, even though the general

provision standing alone would be broad enough to include the subject to which the specific provision relates, it is the Political Reform Act that controls here, rather than Government Code section 8920(a). *Woods v. Young, supra,* 53 Cal.3d at 324-325.

Further, in order to allow individuals with the necessary expertise from academic and commercial entities that do have financial interests in the subject of stem cell research to serve on the ICOC, the Act provides for even more specific and limited conflicts of interest provisions than those found in the Political Reform Act.[5] Thus the provisions of the Act, and the provisions of the Political Reform Act, apply to conflicts of interest of the committee members, not Government Code section 8920(a). For the same reasons, the provisions in the Act concerning "incompatible office" preempt any claims of violation of Government Code section 19900. (See §125290.30(g) (2).)

As to the common law prohibitions against conflicts of interest, such prohibitions are applicable only to the personal, rather than financial, interests of ICOC members. See *Clark v. City of Hermosa Beach* (1996) 48 Cal.App.4th 1152, 1171 (while the Political Reform Act focuses on financial conflicts of interest, the common law extends to non-economic conflicts of interest). Thus the common law conflict of interest prohibitions would be applicable only to the personal interests ICOC members might have regarding research for cures for specific diseases. However, the Act has abrogated the common law by enacting express statutory provisions relating to conflicts arising from such interests. (§125290.30(g)(1)(B); and see *Clark v. Hermosa Beach, supra*, 45

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[5] The Act provides that members of the ICOC will not be deemed to have a conflict of interest based on their status as employees of entities that may apply for grants, but that they may not take part in or attempt to influence decisions to approve or award a grant, loan, or contract to said employer, but may participate in a decision to approve or award a grant, loan, or contract to a nonprofit entity in the same field as his or her employer. (§125290.30(g).)

Cal.App.4th at 1171, n.18 (common law conflicts prohibitions may be abrogated by express statutory provisions).

In any event, even if Government Code section 8920(a) did apply to the ICOC members, Plaintiff CFBC has not met its burden of showing that the ICOC members are in violation of that code section. In order for the members to have interests in "substantial conflict" with the proper discharge of public duties under Government Code section 8920(a), Plaintiff must show that the each member "has reason to believe or expect that he will derive a direct monetary gain or suffer a direct monetary loss, as the case may be, by reason of his official activity." (Govt. Code §8921 (emphasis added).) Plaintiff CFBC has made no such showing here. Plaintiff simply points to disclosure forms and biographies showing that some of the members have ownership interests in various biotechnology companies, and some are employees of companies or academic institutions of potential grantees—but presents no evidence that any committee member will accrue a direct monetary gain or loss from service on the ICOC. The evidence that Mr. Klein, as ICOC chair, has publicly stated that he will not own stock in any biomedical companies while serving as chair does not serve as evidence that such limitation is required of members of the ICOC.

Plaintiff CFBC's claim that the chair of the ICOC, Robert Klein, and the vice chair, Edward Penhoet, are in violation of conflict of interest prohibitions suffers from a similar lack of evidentiary support. Plaintiff is correct that, based on the mandate of the Act, the ICOC chair and vice chair are employees of CIRM (§125290.20(a)(6)), and that, as a result, the two are bound to comply with the conflict of interest laws applicable to CIRM employees. Testimony was presented that while they have declined to accept

compensation and so do not consider themselves employees, the chair and vice chair do comply with the standards imposed on CIRM employees. Plaintiff CFBC provided no evidence that either individual is in violation of any conflict of interest rule or regulation with which CIRM employees must comply.

In light of the above, there is neither a legal nor evidentiary basis for a declaration that the ICOC members are disqualified from holding office as members of the ICOC, or that the chair or vice chair of the ICOC are disqualified to be employees of CIRM.

C. Grants Working Group

Plaintiff CFBC does not prevail on its third conflict of interest claim. Plaintiff CFBC argues that the Act is invalid because it incorrectly states that the working groups are exempt from the conflict of interest laws as advisory groups. This is because, according to Plaintiff CFBC, the Grants Working Group is not advisory, but is in fact the decision making authority. As set forth above, the Court has determined, based on the terms of the Act and the evidence presented at trial, that the Grants Working Group is purely advisory and has no decision making authority. As a result, this claim fails.

D. "Unconstitutional" Exemption from Conflict of Interest Laws

Plaintiff CFBC does not prevail on its final conflict of interest claim. Plaintiff CFBC argues that the Act's exemption of ICOC members and the working groups from conflict of interest laws is unconstitutional. No constitutional provision prohibits conflicts of interest; such prohibitions arise from statutory law or common law. See, e.g., *Clark v. City of Hermosa Beach* (1996) 48 Cal.App.4th 1152, 1177-78 (violations of statutory and common law conflict of interest rules did not give rise to a violation of

constitutional due process requirement). Thus, Plaintiff CFBC cannot demonstrate that the Act's exemption of the ICOC from conflict of interest provisions "inevitably pose a present total and fatal conflict with the applicable constitutional prohibitions." *Pacific Legal Foundation v. Brow, supra,* 29 Cal.3d at 180-181 [emphasis added].

Plaintiff CFBC argues that the Act, by requiring that the ICOC be comprised of members who have an interest (either personal or professional) in stem cell research, is a violation of fundamental public policy that cannot be saved by the conflict of interest exemptions in the Act. However, the Act's exemptions from conflict of interest law reflect a policy choice—and having been approved by the voters, that choice now represents public policy. See *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1989) 214 Cal.App.3d 1348, 1365-1366 ("A statute is not subject to objection on the ground it contravenes public policy because, as a legislative enactment, it becomes public policy.") In adjudicating a constitutional challenge, the economic or social wisdom or general propriety of the initiative is irrelevant; the sole question is whether it violates constitutional standards. *Calfarm Ins. Co. v. Deukmejian, supra,* 48 Cal.3d at 814-815. Plaintiff has not demonstrated that the Act does so.

VI. CHALLENGES TO THE FORM OF PROPOSITION 71

Plaintiff raises three constitutional challenges to the Act based on the form in which Proposition 71 was presented to the voters, arguing that the proposition on the ballot violated the single subject rule, that it unlawfully revised the Constitution, and that it revised statutes without providing proper notice to the voters by including the full text of the revised statutes. Each claim fails, for the reasons set forth below.

A. Single Subject Rule

Plaintiff CFBC has not demonstrated that Proposition 71 violates the Constitutional provision that an initiative must be limited to a single subject. (Constitution, Article II, §8(d).) Initiatives that encompass a wide range of diverse measures will withstand a challenge under this provision so long as their provisions are either functionally related to one another or reasonably germane to each other or the objects of the enactment. *Harbor v. Deukmejian* (1987) 43 Cal.3d 1078, 1098; *California Trial Lawyers Assoc. v. Eu* (1988) 200 Cal.App.3d 351, 358.

The over-arching subject of Proposition 71 is stem cell research and funding. The initiative's purpose and intent includes funding stem cell research; setting standards for such research; and reducing the long-term health care cost in California through the development of therapies that treat diseases with the ultimate goal to cure them. In addition, the initiative's intent is to benefit the California economy by creating jobs and advancing the biotech industry through such research. The ICOC oversees the research, with representatives of UC and other California universities with medical research institutions, disease advocacy groups, and experts in the development of medical therapies. (Prop. 71, §3.)

Plaintiff CFBC asserts that the following "subjects" are not germane to the subject of the stem cell funding, and so are in violation of the single subject rule: (a) conflicts of interest; (b) non-stem-cell "vital research opportunities"; (c) government regulation of medical research, technical and funding standards, conflicts of interest, ethics and commercial exploitation, applicable not only to stem cell research but also to "other vital research opportunities," to the commercial and privacy rights of women who

sell their ova (human eggs) for research purposes, bonds, and the authority of the Regents of the University of California; (d) provisions authorizing the ICOC to negotiate on behalf of the state of California, including to "negotiate standards with federal and state governments and research institutions" (§125292.10(u)); and (e) to enter into contracts, to sell or license the intellectual property rights of the state for commercial exploitation. (See CFBC's Post Trial Brief, at 7:2-12.) Plaintiff CFBC has not demonstrated that any of the above is not functionally related or germane to stem cell research and funding, thus violating the single subject rule.

As in its Motion for Judgment on the Pleadings, Plaintiff CFBC's Post Trial Brief provides detailed arguments only as to the conflict of interest exemptions and "other vital research" provisions, but again does not prevail on either. The conflict of interest exemptions (§125290.30(g)) are specifically and solely applicable to ICOC members, so are clearly related to the creation of the ICOC, the entity intended to oversee the stem cell research and the funding thereof. Moreover, the composition of the ICOC is part of the stated intent of the Act, and Plaintiff CFBC has not demonstrated that the exemptions are not functionally related to the intended make-up of the committee, i.e., are not meant to allow the ICOC to function as constituted.

As to Plaintiff's argument that the ICOC's funding of "other vital research opportunities" is not related to stem cell research funding: on the face of the Act, such funding is germane and related to the other provisions of the Act in that it is limited to funding only those opportunities "that will result in" the types of cures sought by the Act. (Constitution, Article XXXV, §2(a).)

The Court finds that the subjects CFBC argues violate the single subject rule are reasonably interrelated and do not violate the rule. See *Amador Valley Joint Union High Sch. Dist. v. State Bd. Of Equalization* (1978) 22 Cal.3d 208, 231.

B. Improper Revision of California Constitution

An initiative may amend, but cannot revise, the Constitution. (Constitution, Article XVIII, §3.) Plaintiff CFBC has failed to demonstrate Proposition 71 did more than amend the Constitution. It has failed to show that it necessarily or inevitably appears from the face of the Act and Article XXXV that the initiative will substantially alter the basic governmental framework set forth in the Constitution. *Legislature v. Eu, supra*, 54 Cal.3d at 510; *Brosnahan v. Brown* (1982) 32 Cal.3d 236, 261. Plaintiff CFBC points to the conflict of interest exemptions for ICOC members as allowing creation of an agency that constitutes a qualitative revision of the Constitution. It is not unusual for specialized governmental boards and agencies of this State, which affect a given industry, to be comprised of members who derive income from within that industry, and to do so without injuring the public interest. See *Consumers Union of U. S., Inc. v. California Milk Producers Advisory Bd.* (1978) 82 Cal.App.3d 433, 438, 448. Plaintiff has not established that the conflict of interest exemptions in the Act alter the basic governmental framework.

C. Full Text Rule

A section of a statute may not be amended unless the section is re-enacted as amended; in other words, unless the full text of the amended statute is set forth. Constitution, Art. IV, section 9. This "full text" rule, however, applies only to the

amendment of a statute. See *Brosnahan v. Brown* (1982) 32 Ca.3d 236, 256-57. The Act did not amend any statutes or sections thereof, so the full text rule does not apply.

VII. PROPOSITION 71 ELECTION

Plaintiff CFBC's challenge to the Proposition 71 election also fails. A post-election challenge to an election is limited to either a statutory ground enumerated in Elections Code section 16100 or a violation of constitutional rights. *Friends of Sierra Madre v. City of Sierra Madre* (2001) 25 Cal.4th 165, 192 and n.17; *Horwath v. City of East Palo Alto* (1989) 212 Cal.App.3d 766, 773-75. In order to overturn a ballot measure election on constitutional grounds, Plaintiff must show that "there was some irregularity or illegality in the election process which affected the result. It requires a departure from legal requirements that 'in fact prevented the fair expression of popular will'." *Horwath, supra*, 212 Cal.App.3d at 775, citing *Canales v. Alviso* (1970) 3 Cal.3d 118, 127.

Plaintiff CFBC does not assert any Election Code statutory ground for its election challenge. Rather, Plaintiff raises constitutional due process grounds, asserting that the Proposition 71 ballot materials, including the text of the Act itself and the analysis provided by the Legislative Analyst, contained misleading statements and material omissions of fact that caused Proposition 71 to be so inaccurate and misleading that voters were prevented from making an informed choice. Plaintiff CFBC points to three ways in which the ballot materials were misleading. As to each, Plaintiff argues that the ballot materials are in violation of Government Code section 88003 because the Legislative Analyst failed to properly prepare an impartial analysis that set forth the

information that the voters needed to understand the issue adequately, or that set forth an accurate financial analysis of the initiative.

Generally a challenge to an impartial analysis can only be brought before an election. *Friends of Sierra Madre, supra*, 23 Cal.4th at 193. For such a challenge to succeed after the election has occurred, Plaintiff CFBC must show that the impartial analysis profoundly misled the electorate as to the very nature and purpose of the initiative, not merely that it did not educate the electorate as to all the legal nuances of the measure. *Kerr v. County of Orange* (2003) 106 Cal.App.4th 914, 934; *Horwath v. City of East Palo Alto, supra*, 777-779. This test for a post-election challenge has been held to be a very high bar. *Kerr, supra*, at 934. None of the claims presented by Plaintiff CFBC successfully clear that bar.

A. Confusion Over What Type Of Research Is Funded

Plaintiff CFBC contends that the voters were misled because it was represented to the voters that research and funding of adult stem cell and cord blood cell research were authorized, when, in reality, such research cannot be funded under the Act because this research is currently funded by the National Institute of Health ("NIH"), and NIH research is prohibited under the Act. A review of the ballot materials, however, reveals no representation that adult stem cell or cord blood cell research will be funded. Nor does the Plaintiff point to such a representation.

The Act does define "adult stem cell" (§125292.10(b)), and the initiative provides the right to engage in such research (Constitution, Art. XXXV, section 5). The Act neither mandates nor prohibits funding for such research. Rather, based on funding criteria, at the present time, such research is not likely to be funded under the Act. One

of the Act's criteria that the Grants Working Group is to use in scoring grant applications is that "other research categories funded by the NIH shall not be funded by the institute." (§ 125290.60 (c)(1)(C).

Plaintiff CFBC argues that the impartial analysis should have set forth all types of stem cell research that were mentioned in the Act, but, as a result of being funded by the NIH, were not able to receive funding under the Act. Evidence was presented that federal funding is a moving target; that types of research funded by the NIH at the time of the election may not be funded by the federal government in the future, and so would not be limited by the section 125290.60(c)(1)(C) criteria. Moreover, such research is not fully prohibited by those criteria in any event. There is at least one exception to the provisions of that section allowing for funding of such research if recommended with at least a two/thirds vote of the Grants Working Group. (See 125290.60(c)(1)(D).)

In addition, to the extent that there could have been any voter confusion on this issue, this was cured by statements in the ballot materials. In the "Argument Against Proposition 71", the opponents of the initiative raised this same argument, stating that Proposition 71 excludes initial support for adult stem cell and cord blood stem cell research, which can be funded only upon a two-thirds vote of the working group. See *Horwath, supra*, 212 Cal.App.3d at 777-78 (court to consider other ballot material, including argument for or against measure, to determine whether statutory noncompliance rendered election unfair.)

B. Confusion Over Scientific Terminology

Next, Plaintiff CFBC argues that the impartial analysis is faulty because it does not explain the meaning of "critical scientific terms" used but not defined in the Act.

These terms are "cloning" (as contrasted to "human reproductive cloning"), "somatic cell nuclear transfer," and "products of in vitro fertilization". (See CFBC's Post-Trial Reply Brief at p. 3.)

Proposition 71 both defines the term "human reproductive cloning", and bans its funding by CIRM. (Const. Art. XXXV, §3; and §12592.10(k)[6].) Plaintiff CFBC argues that the Act is misleading because it does not define "cloning" separately from the definition of the banned "human reproductive cloning," and does not disclose that the initiative creates the right to clone and destroy human cells and human embryos. However, this very controversy was put directly before the voters by initiative opponents in the ballot materials. The "Rebuttal to Argument in Favor of Proposition 71," states "It specifically supports 'embryo cloning' research – also called 'somatic cell nuclear transfer ...", and "In addition, the perfection of embryo cloning technology ... will increase the likelihood that human clones will be produced." Thus any potential for voter confusion arising from the impartial analysis's omission of the fact that cloning of cells could occur under the initiative was cured through the ballot arguments sent out to voters prior to the election.

That same portion of the Rebuttal cures any potential confusion caused by the lack of a definition of "somatic cell nuclear transfer" in the impartial analysis or the Act itself.

Finally, as to the phrase "products of in vitro fertilization treatments", while no formal definition is provided, the impartial analysis does explain the phrase, in laymen's terms, stating that embryonic stem cells are "ordinarily extracted from extra embryos

[6] " 'Human reproductive cloning' means the practice of creating or attempting to create a human being by transferring the nucleus from a human cell into an egg cell from which the nucleus has been removed for the purpose of implanting the resulting product in a uterus to initiate a pregnancy."

that have been donated for research by parents who tried to conceive a child through certain procedures performed at fertility clinics." Moreover, Plaintiff has not provided any evidence that any voter was confused or misled as to the meaning of that phrase, or what was meant by its inclusion in Article XXXV, section 3 of the Constitution.

C. Financial Representations

Plaintiff CFBC raises several claims of misleading statements relating to financial issues in Proposition 71.

First, Plaintiff argues that the impartial analysis was faulty because it represented to the voters that the interest costs for the repayment of the state general obligation bonds authorized by the Act would be $3 billion, when in fact the State Treasurer estimates that the true cost of the interest on the bonds will be an additional $423 million. Plaintiff CFBC, however, presented no evidence of misleading financial projections. Its argument is based entirely on a post-election letter from the State Treasurer to the ICOC setting forth bonding alternatives. (Exh. 2045.) This letter indicates that over the life of the bonds at issue the interest cost of taxable bonds would be $423 million more than the cost of tax-free bonds, but says nothing whatsoever about the Legislative Analyst's projection of $3 billion in interest costs.

Second, Plaintiff CFBC claims that the impartial analysis is faulty because it does not explain the speculative nature of a statement in the initiative that the Act would "Protect and benefit the California budget ... by funding scientific and medical research that will significantly reduce state health care costs in the future." Plaintiff argues that this is an "unqualified promise," made with no factual basis because there is no way to know whether or not any of the funded research will ever result in any revenues or health

care cost savings to the State. (See CFBC Post Trial Brief at p.16.) Plaintiff does not present any evidence that the quoted material serves as a "promise" by anyone that health care costs would be reduced. Rather the statement, found in the "Purpose and Intent" section of the initiative, is an aspiration on the part of the people of the state to "[p]rotect and benefit the state budget." Further, the summary of fiscal impact at the very front of the impartial analysis states: "Unknown potential state and local revenue gains and cost savings to the extent that the research projects funded by this measure result in additional economic activity and reduced public health care costs." (Exh. 2, p. 68 [emphasis added].) This acknowledgement that there is no way of knowing what the impact will ultimately be is set forth in more detail in the text of the analysis: "If the measure were to result in economic and other benefits that would not otherwise have occurred, it could produce unknown indirect state and local ... costs savings. Such effects could result, for example, ... if funded projects reduce the costs of health care ... The likelihood and magnitude of these and other potential indirect fiscal effects are unknown." (*Id.* at p. 71 [emphasis added].) The speculative nature of the fiscal impact of the initiative is clear from the language. There is nothing misleading.

Third, Plaintiff CFBC argues that "[t]he Proposition 71 campaign promised" the voters that the state would receive substantial royalties from intellectual property developed through the Act, with the impartial analysis stating the amount is "unknown but could be significant." (See CFBC Post Trial Brief at p.17.) Plaintiff CFBC argues that since it is impossible to know what the value is of technology that hasn't been invented yet, this was a misrepresentation. Plaintiff CFBC, however, has presented no admissible evidence of any campaign "promises" of royalties. The sole evidence

Plaintiff CFBC cites to in support of this claim is a post-election letter that includes a hearsay statement that a study had been released by proponents of Proposition 71. (*Id.* at p. 17, citing Exh. 2045.) No copy of the alleged study was offered into evidence, nor any facts as to how, when, or even if it was publicized to the voters. Moreover, such a study, even if it exists, would not by itself be evidence that voters were misled. The voting public is generally aware that statements concerning the potential effect of an initiative are nothing more than opinions. *Chavez v. Citizens For a Fair Farm Labor Law* (1978) 84 Cal.App.3d 77, 82.

As set forth above, the impartial analysis uniformly described the financial impacts of the Act as "unknown." There is no evidence that the ballot materials were in any way misleading as to the financial impacts so as to justify invalidating the Act on due process grounds.[7]

VIII. EQUAL PROTECTION GUARANTEES

Plaintiff CFBC has not demonstrated that the Act violates the equal protection guarantees of the Constitution as set forth in the equal protection and special privileges and immunities clauses. See Constitution, Art. I, §§7(a) and (b), Art. XIV, §16. The analysis under these provisions is the same. See *Serrano v. Priest* (1971) 5 Cal.3d 584, 596, n. 11. There is no violation unless people who are similarly situated with respect to the legitimate purpose of the law are treated unequally. *People v. Rhodes* (2005) 126 Cal.App.4th, 1374, 1383-1384. If such people are treated unequally, then a determination must be made as to whether the law impinges on a fundamental right or

[7] Plaintiff CFBC's final argument concerning financial misrepresentations in Proposition 71 (Plaintiff CFBC's Post-Trial Brief at p.18) is not based on due process grounds, but is a statutory claim for violation of securities law, and the Court will address it separately.

operates to the peculiar disadvantage of a suspect class, in which case the law is subject to strict scrutiny. If not, then it will pass muster if it bears a rational relationship to a legitimate state purpose. *Id.* at 1384.

Plaintiff CFBC bases its equal protection claims on three aspects of the Act: (1) the provisions describing the qualifications required of individuals to be appointed as members and as chair and vice chair of the ICOC, (2) the provisions that permit certain members of the ICOC to appoint alternates, and (3) the provisions that exempt ICOC members from certain conflict of interest laws that govern all other public officials. (See CFBC Post Trial Brief at pp. 37-38.) Plaintiff CFBC has at no time alleged that the Act impinges on a fundamental right or impacts a suspect class, so the Court need only determine whether the provisions treat similarly situated people unequally and, if they do, whether the differential treatment is rationally related to a purpose of the Act.

As to the membership of the ICOC generally, the Act provides that only individuals with certain indicia of expertise in the purposes of the Act, i.e., the evaluation of stem cell research projects, standards for conduct of such projects, and facilities for such projects, may serve on the ICOC. Individuals without such indicia of expertise, i.e., those who are not executive officers of academic research institutions or commercial life science entities, or representatives of disease advocacy interests, are not similarly situated for the purposes of the Act. Thus the fact that one group can be appointed and the other cannot is not unequal treatment of similarly situated groups.

In addition to the equal protection claims regarding ICOC membership in general, Plaintiff CFBC raises several more specific claims based on those who can, and cannot, be members of the ICOC under the Act. None succeed.

Plaintiff CFBC argues that there is an equal protection violation because the Act restricts the disease-advocacy members of the ICOC to representative advocates of only ten named diseases and conditions, out of the more than 70 categories of diseases and conditions that, according to Plaintiff CFBC, are "admitted" in Proposition 71 to be proper candidates for stem cell research. (See CFBC Post Trial Brief at p.37.) However, there is no language in the text of the initiative to support this argument. Proposition 71 does not "admit" or identify specific diseases, injuries, or conditions that will benefit from stem cell research. Rather, in its introductory sections, the initiative states that "serious, often critical or terminal, medical condition[s] ...could potentially be treated or cured with stem cell therapies" (Prop. 71, §2, Findings and Declarations) and that it is the intent of the people of California in enacting this measure to "maximize the use of research funds by giving priority to stem cell research that has the greatest potential for therapies and cures." (*Id.*. §3, Purpose and Intent.) Moreover, Plaintiff provides no argument or analysis demonstrating a lack of rational basis for the choice of diseases and conditions which are included in the selection criteria. (§125290.20(a)(3-5). The Court finds that there is a rational purpose for limiting the number of individuals on the ICOC to individuals affiliated with the ten identified disease advocacy groups, there being a reasonable inference that these ten groups would best assist in the purpose of the Act to "maximize the use of research funds by giving priority to stem cell research that has the greatest potential for therapies and cures."

Plaintiff CFBC also raises an equal protection argument on the grounds that the Act restricts eligibility for the chair and vice chair of the ICOC with "unreasonably narrow qualifications," including mandatory membership in one of the ten disease

advocacy categories. (See CFBC Post Trial Brief at p.37.) Here again, Plaintiff provides a mere assertion, with no analysis as to why the selection criteria cannot be shown to be rationally related to the goals of the Act.

The Act sets out mandatory criteria for the chair and vice chair of the ICOC, along with additional criteria for consideration. (§125290.10(6)(A)-(B).) For the chair, the mandatory criteria includes documented history in successful stem cell research advocacy; experience with state and federal legislative processes that must include some experience with medical legislative approvals of standards and/or funding; nomination to the ICOC by an elected official as a representative of one of the ten identified disease advocacy groups; and no current employment, or even leave of absence status, from any prospective grant or loan recipient institutions in California.

The additional criteria for consideration for the chair includes experience with governmental agencies or institutions (either executive or board position); experience with the process of establishing government standards and procedures; legal experience with the legal review of proper governmental authority for the exercise of government agency or government institutional powers; and direct knowledge and experience in bond financing.

The vice chair must satisfy the following criteria: documented history in successful stem cell research advocacy; nomination to the ICOC by an elected official as a representative of one of the ten identified disease advocacy groups; and direct knowledge and experience in bond financing. The vice chair is to be selected from among individuals who have attributes and experience complementary to those of the

chair, preferably covering the criteria not represented by the chair's credentials and experience.

The criteria are not overly narrow, and are rationally related to assuring that the chair and vice chair have appropriate knowledge and experience to head the ICOC. This includes experience beyond only being affiliated with one of the identified disease advocacy groups.

As to the Act's differing treatment of individuals from commercial life science entities, allowing ICOC members to be only from entities which are not actively engaged in stem cell research, the distinction rationally gives preference to such individuals because they are less likely to have conflicts of interest than members of commercial life science entities that do conduct such research.

There is also a rational basis for the distinctions the Act makes among public officials, limiting the scope of conflict of interest laws pertaining to ICOC members and exempting them from the incompatible office doctrine, even though other public officials are not so exempted. The goal of the Act is to form the ICOC from individuals who can act as a panel of experts. The Act sets forth as indicia of such expertise various professional and personal affiliations. These affiliations, by their very nature, could result in the ICOC members being disqualified from membership on the committee on conflict of interest grounds by the existence of the very affiliations which qualify them for membership in the first place. Thus the limited exceptions from the conflict of interest rules applicable to ICOC members are rationally related to allowing the ICOC to function as a panel of experts, and does not violate equal protection grounds.

As to Plaintiff CFBC's argument that the Act "permits appointed members to participate through self-appointed surrogates" (see CFBC Post Trial Brief at p.38), Plaintiff CFBC provides no legal basis as to why the use of alternates violates equal protection guarantees.

IX. PROHIBITION ON PRIVATE ENTITY PERFORMING PUBLIC FUNCTION

Plaintiff CFBC alleges that the Act violates Article II, section 12 of the Constitution prohibiting an initiative from identifying any private entity to perform any function or have any government power. Plaintiff CFBC alleges as the basis for this violation the provisions of the Act that provide that ten members of the ICOC be representatives of certain disease advocacy groups. (CFBC Amended Complaint, ¶25.) This claim fails. The Act does not mandate that any particular disease advocacy group perform any function. Rather, it sets forth general criteria for appointments to the ICOC, including the requirement that ten of the appointments be made from among representatives of disease advocacy groups. The Act does not identify any specific group from which appointments are to be made, but only provides a generic list of the groups by disease. (§125290.20(a)(3), (4), and (5).)

Plaintiff has not met its burden of showing that the Act is clearly, positively and unmistakably unconstitutional under Article II, section 12.

X. CONSTITUTIONAL AUTONOMY OF THE UC REGENTS

Plaintiff CFBC has not demonstrated that the Act violates Article IX, section 9 of the Constitution. While that provision grants the Regents of the University of California extensive powers to organize and govern the University, the Regents are not entirely autonomous. *Campbell v. Regents of Univ. of Cal.* (2005) 35 Cal.4th 311, 320-21. The

Regents are subject to legislation which addresses matters of statewide concerns not involving internal university affairs. *Id.* at 321; *San Francisco Labor Council v. Regents of Univ. of Cal.* (1980) 26 Cal.3d 785, 789. There is no question that the Act, approved by a majority of the voters in California, addresses a matter of statewide concern. Plaintiff CFBC has not demonstrated that, on its face, the exemption from the incompatible offices doctrine (§125290.30(g)(2)) impermissibly interferes with University of California internal affairs.

Nor does Plaintiff CFBC demonstrate that, by requiring the ICOC to comply with the same competitive bidding statutes (Public Contract Code §§10500-10526) with which the University of California must comply, the Act improperly delegates the powers of the University of California to the ICOC. (§125290.30(f).) The Public Contract Code statutes are not "powers" that the Regents have, but rather statutory requirements with which they must comply.

Plaintiff has not met its burden of showing that the Act is clearly, positively and unmistakably unconstitutional under Article IX, section 9.

XI. VIOLATIONS OF SECURITIES LAWS

Plaintiff CFBC's final basis for its validation complaint is that the bonds authorized pursuant to the Act are invalid under state securities laws, specifically Corporations Code section 25401, which forbids fraud in the selling of a security. [8] This claim fails.

[8] Plaintiff originally alleged violations of federal securities laws as well (CFBC Amended Complaint at ¶31), but abandoned that claim in limine.

Section 25401 provides that:

> It is unlawful for any person to offer or sell a security in this state or buy or offer to buy a security in this state by means of any written or oral communication which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading.

Plaintiff CFBC argues that the solicitation of public support for the issuance of the bonds, i.e., for the passage of Proposition 71, was based on misleading financial representations and material omissions, and thus was in violation of this statute. As the Court has already found above there is no evidence to support a finding that the Proposition 71 ballot materials contained financial misrepresentations. In addition, neither the ballot materials, nor the text of Proposition 71 fall within the statutory definition of a security, so the provision is not applicable to them in any event. (See Corporations Code §25019.)

XII. CONCLUSION

Resolving, at it must, all doubts in favor of the validity of the statute, the Court finds that Plaintiffs have not shown that the Act is clearly, positively, and unmistakably unconstitutional. The Act and the bonds issued thereunder are valid.

Further, Plaintiffs have not met their burden to obtain any of the declaratory or injunctive relief sought in their complaints.

This Proposed Statement of Decision shall be the Statement of Decision in this matter unless within ten days any party specifies controverted issues or makes proposals not covered in this decision. (Cal. Rules of Court, Rule 232(a).)

4-21-06
Date

Bonnie Sabraw
Judge of the Superior Court

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA

Declaration of Service

PEOPLE'S ADVOCATE, et al. Vs. INDEPENDENT CITIZENS' OVERSIGHT COMMITTEE, et al. HG05 206766 Consolidated with HG05 235177

I certify that I am not a party to this action, and that on or before the date stated below, I caused a copy of PROPOSED STATEMENT OF DECISION

XX Mailed by United States Mail, First Class, postage pre-paid on the date below, to the parties listed below:

Dana Cody
Life Legal Defense Foundation
7653 Away Way
Citrus Heights, CA 95610

Catherine W. Short
P. O. Box 1313
Ojai, CA 93024

Robert M. Taylor
Law Office of Robert M. Taylor
30942 Via Mirador
San Juan Capistrano, CA 92675

Terry L Thompson
Law Offices of Terry L. Thompson
P. O. Box 1346
Alamo, CA 94507

David L. Llewellyn, Jr.
Llewellyn & Spann
5530 Birdcage Street, Suite 210
Citrus Heights, CA 95610

Tamar Pachter, Deputy Attorney General
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004

Leslie R. Lopez, Deputy Attorney General
1300 I Street
P. O. Box 944255
Sacramento, CA 94244-2550

Kathrin Sears, Deputy Attorney General
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004

Steven N. H. Wood
Stoddard Bergquist Wood & Anderson LLP
1470 Maria Lane, Suite 300
Walnut Creek, CA 94596

Mark H. Epstein
Munger Tolles & Olson, LLP
355 South GrandAvenue, 35th Floor
Los Angeles, CA 90071-1560

Dated: April 21, 2006

PAT S. SWEETEN, EXECUTIVE OFFICER/CLERK

by: _____
Sara Dalleske, Deputy Clerk